

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

J. LAZARO TRUCKING,

Respondent.

**Docket No. FMCSA-2010-0004¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. *Background*

On November 6, 2009, the Federal Motor Carrier Safety Administration (FMCSA) Massachusetts Division Administrator served a Notice of Claim (NOC) on J. Lazaro Trucking (Respondent).² The NOC, based on an October 21, 2009 compliance review, charged Respondent with one violation of 49 CFR 382.115(a), failing to implement an alcohol and/or controlled substances testing program; one violation of 49 CFR 391.51(b), failing to maintain a driver qualification file on each driver employed; and one violation of 49 CFR 392.9a(a)(1), operating without the required operating authority. The NOC proposed a total civil penalty of \$2,650.

After Respondent failed to respond to the NOC, the Field Administrator for FMCSA's Eastern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on December 14, 2009.³ The NDFAO advised Respondent that

¹ The prior case number was MA-2010-0011-US0536.

² Exhibit A to Field Administrator's Response and Opposition to Petition for Reconsideration (hereafter Claimant's Response to Petition).

³ Exhibit B to Claimant's Response to Petition.

the NOC would become the Final Agency Order in this proceeding effective December 21, 2009, with the civil penalty immediately due and payable on that date.

On or about January 6, 2010, Respondent served a Petition for Reconsideration of the Final Agency Order.⁴ The petition did not explain why Respondent failed to timely respond to the NOC and addressed only one of the three violations cited therein—the failure to implement an alcohol and/or controlled substances testing program.⁵ Respondent stated that a testing program was now in place and attached a document from Foley Services, Inc., acknowledging that Respondent had added two drivers to a random testing program administered by Foley effective October 29, 2009.

On February 4, 2010, USDOT Dockets advised Respondent that its Petition for Reconsideration had been rejected for failure to include a signed certificate of service.⁶ Respondent was directed to re-submit its petition with a corrected certificate of service by February 24, 2010. On March 1, 2010, Respondent re-submitted its January 6, 2010 Petition for Reconsideration, altering the certificate of service by substituting the words “Request for Reconsideration” in place of “Notice of Claim” and substituting the signature of Ronald Lazaro, Respondent’s President, for the signature of the FMCSA

⁴ The petition was undated, but was posted by USDOT Dockets on January 6, 2010.

⁵ Respondent alleged corrective action regarding evidence of insurance coverage, vehicle maintenance history and drivers’ time records. However, these alleged corrective actions were not germane to the violations alleged in the NOC.

⁶ Instead of a signed certificate of service showing service of the Petition for Reconsideration, Respondent included a copy of the certificate of service attached to the NOC, which was dated November 6, 2009, and signed by the FMCSA Massachusetts Division Administrator. The letter from USDOT Dockets incorrectly cited Respondent for violating 49 CFR 386.31(b), the provision in the Agency’s former Rules of Practice containing the certificate of service requirement, rather than 49 CFR 386.7(c), the current requirement, which has been in effect since November 2005.

Massachusetts Division Administrator. The November 6, 2009 date on the certificate of service remained unchanged.

In his Response and Opposition to the Petition for Reconsideration served March 24, 2010, Claimant requested that the petition be denied because: (1) Respondent's second attempt to file its Petition was not timely; (2) the certificate of service accompanying the re-submitted petition is still faulty because it bears the date of service of the NOC, not the Petition for Reconsideration; and (3) Respondent defaulted by failing to timely reply to the NOC and did not provide sufficient grounds for vacating the Final Agency Order.

2. Decision

Claimant is correct that Respondent's second attempt to file its Petition for Reconsideration did not comply with § 386.7(c) because the certificate of service included the wrong service date.⁷ Notwithstanding this deficiency, Claimant has not shown that he was misled or otherwise prejudiced by Respondent's flawed filing. Accordingly, Respondent's noncompliance with § 386.7(c) does not warrant dismissal of the Petition for Reconsideration.

It is undisputed that Respondent did not reply to the NOC on or before December 11, 2009, as required by 49 CFR 386.14(a).⁸ Therefore, Respondent defaulted. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field

⁷ Claimant's argument that the re-submitted Petition was not timely filed stands on less solid ground. Although Claimant stated that the Petition "was to be served no later than March 1, 2010," he also stated that it was not mailed until March 1, 2010. Under § 386.7(d), a document is considered served on the date of mailing.

⁸ This date was calculated by adding 30 days to the November 6, 2009 service date of the NOC, in accordance with § 386.14(a), and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has not met its burden of demonstrating that the Final Agency Order should be vacated. Because Respondent offered no explanation regarding its failure to file a timely reply to the NOC, it did not show excusable neglect.

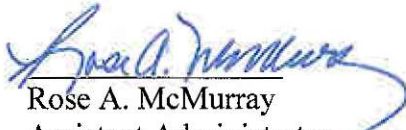
Respondent also failed to provide a meritorious defense to any of the violations charged in the NOC. It failed to address two of the violations (failure to maintain a driver qualification file and operating without the required operating authority) and submitted evidence of post-compliance review corrective action for the drug and alcohol testing violation. This document supported, rather than rebutted, the allegation in the NOC regarding Respondent's past noncompliance with § 382.115(a). Consequently, Respondent did not have a meritorious defense to the allegations in the NOC. Moreover, Respondent served its Petition for Reconsideration approximately three weeks after receiving the NDFAO.⁹ I do not consider this to be due diligence in seeking relief.

Because Respondent has failed to show that the Final Agency Order should be vacated based on excusable neglect, a meritorious defense, or due diligence in seeking relief, the Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹⁰

⁹ The NDFAO was sent to Respondent via Federal Express on December 14, 2009. See Exhibit B to Claimant's Response to Petition.

¹⁰ The NDFAO stated that the \$2,650 civil penalty was due and payable on December 21, 2009, the date that the NOC would become the Final Agency Order. Because Respondent did not file its petition for reconsideration by December 21, 2009, the clock on the effective date of the Final Agency Order was not stayed by the petition.

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4.15.10

Date

Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 16 day of April, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Ronald Lazaro, President
J. Lazaro Trucking
222 South Washington Street
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